

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
AT HUNTINGTON

CHRISTOPHER FAIN; ZACHARY  
MARTELL; and BRIAN MCNEMAR,  
individually and on behalf of all others  
similarly situated,

*Plaintiffs,*

v.

WILLIAM CROUCH, in his official capacity  
as Cabinet Secretary of the West Virginia  
Department of Health and Human Resources;  
CYNTHIA BEANE, in her official capacity  
as Commissioner for the West Virginia  
Bureau for Medical Services; WEST  
VIRGINIA DEPARTMENT OF HEALTH  
AND HUMAN RESOURCES, BUREAU  
FOR MEDICAL SERVICES; TED  
CHEATHAM, in his official Capacity as  
Director of the West Virginia Public  
Employees Insurance Agency; and THE  
HEALTH PLAN OF WEST VIRGINIA,  
INC.

*Defendants.*

CIVIL ACTION NO. 3:20-cv-00740  
HON. ROBERT C. CHAMBERS

REPORT OF PARTIES' PLANNING MEETING<sup>1</sup>

1. Pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, a meeting was held on June 21, 2021. Those participating were:  
Anna Prakash for Plaintiffs  
Nicole Schladt for Plaintiffs

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<sup>1</sup> By agreement of the parties, counsel for the Health Plan of West Virginia, Inc. attended but did not participate in this meeting. Now that its Motion to Dismiss has been denied, The Health Plan of West Virginia, Inc. joins this report.

Avatara Smith-Carrington for Plaintiffs

Tara Borelli for Plaintiffs

Lou Ann Cyrus for Defendants William Crouch, Cynthia Bean, and West Virginia Department of Health and Human Services, Bureau for Medical Services

Eric Salyers for Defendant Ted Cheatham

2. Pre-Discovery Initial Disclosures. The parties have already exchanged the information required by Fed. R. Civ. P. 26(a)(1).

3. Plaintiffs should be allowed until September 15, 2021 to join additional parties and until September 15, 2021 to amend the pleadings. Defendant(s) should be allowed until October 8, 2021 to join additional parties and October 8, 2021 to amend the pleadings.

4. Discovery Plan. The parties jointly propose to the court the following discovery plan [Use separate paragraphs or subparagraphs as necessary if the parties disagree.]:

a. Discovery will be needed on the following subjects: Policies, procedures, manuals, and training documents relating to Defendants' coverage of gender-confirming care for transgender Medicaid participants and state health plan enrollees; all documents, ESI, and communications relating to health plan coverage for gender-confirming care; committee or meeting minutes, agendas, presentations, and notes relating to transgender patients and/or gender-confirming care; emails or communications with Medicaid participants, state health plan enrollees, strategic partners, healthcare providers, and/or media relating to the allegations in the complaint; and any other discovery related to class certification and/or the class representatives.

b. The parties have reviewed Local Rule 26.5 and have discussed how the preservation, discovery, and disclosures of electronically stored information ("ESI") should be handled, including the following:

i. It is likely that one or more parties will seek discovery of electronically stored information such as emails, files, or documents stored on a server or computer, or other electronic documents.

☒ Yes      No

The parties have generally agreed upon a format of production of ESI, as follows:

The parties need to consult with their various ESI liaisons and will file an agreed upon or positions on a format of production of ESI by August 13, 2021.

- ii. The parties believe it is possible that metadata may be relevant in this case, such as the date stamp when an electronic document was created or modified.

☒ Yes      No

The parties have generally agreed upon a format for production of such metadata, as follows:

The parties need to consult with their various ESI liaisons and will file an agreed upon or positions on a format of production of such metadata by August 13, 2021.

- iii. At this time, the parties have agreed on what ESI is “reasonably accessible” as defined in R. 26(b)(2)(B).

Yes      ☒ No

If no, identify the nature of any dispute: The parties do not have a dispute, but need to consult with their various ESI liaisons and will file an agreed upon or positions on an ESI protocol by August 13, 2021.

- iv. Have the parties agreed on any search protocol for review of electronic data including methods to filter the data?

Yes      ☒ No

If yes, please describe:

If no, please identify what issues remain outstanding: The parties agree to meet and confer and file an agreed upon or separate positions on an ESI protocol for search processes by August 13, 2021.

- v. Are there any unresolved issues pertaining to the preservation of ESI? If so, please describe: At this time, the parties are unaware of any unresolved issues pertaining to the preservation of ESI.

- vi. Other. Identify all other outstanding issues or disputes concerning ESI: See above.

- c. The parties agree to file a joint motion for the entry of a protective order and to complete and submit with the motion the court’s preferred Agreed Protective Order found online at [www.wvsc.uscourts.gov](http://www.wvsc.uscourts.gov).

Yes      ☒ No

If no, please explain: The parties agree to submit an Agreed Protective Order by August 13, 2021. In light of the sensitive medical and other personal information involved in this case, they may elect to add additional provisions to the district’s form order.

- d. The parties agree to file a joint motion for the entry of an Order Governing the Inadvertent Disclosure of Documents or Other Material and to complete and submit with the motion the court's preferred Agreed Order Governing the Inadvertent Disclosure of Documents or Other Material found online at [www.wvsc.uscourts.gov](http://www.wvsc.uscourts.gov).

Yes ☒ No

If no, please explain:

- e. The parties agree to file a joint motion for the entry of an Agreed Order Setting Deposition Protocol and to complete and submit with the motion the court's optional Order Setting Deposition Protocol available online at [www.wvsc.uscourts.gov](http://www.wvsc.uscourts.gov).

Yes ☒ No

- f. The last day to serve discovery requests is October 18, 2021. The last date on which to take a discovery deposition is 45 days after the last date to serve discovery requests. The last date on which to take a discovery deposition is known as the "discovery completion date." [Fact discovery to be completed by December 1, 2021.]

- g. The parties adopt the discovery limits set forth in the Federal Rules of Civil Procedure.

Yes ☒ No

- h. The parties believe that this case requires additional judicial oversight such as special case management procedures or regularly held conferences.

Yes No ☒

If yes, please describe why the case requires additional judicial oversight and the type of oversight requested.

- i. Reports from retained experts under Rule 26(a)(2) due:

By the party bearing the burden of proof on the issue: January 14, 2022

By the party not bearing the burden of proof on the issue: February 15, 2022

Expert witness disclosures intended solely to contradict or rebut evidence on the same issue identified by another party: March 15, 2022

Expert discovery deadline: April 29, 2022

5. Magistrate judges will resolve all discovery disputes. The parties **DO NOT CONSENT** to have a United States Magistrate Judge conduct any further proceedings in this case, including trial, and order the entry of a final judgment.
6. Mediation shall take place on or before December 15, 2021.
7. Potential Dispositive motions and/or Plaintiffs' motion for class certification shall be filed by June 1, 2022. With response and replies filed according to the Local Rules.
8. The parties request a pretrial conference 90 days after a ruling on all dispositive motions.  
  
The Plaintiff(s) shall submit a proposed pretrial order to Defendant(s) on or before 30 days prior to the pretrial conference.  
  
The Defendant(s) shall compile a proposed integrated pretrial order and submit it to chambers of the presiding judicial officer on or before 15 days prior to the pretrial conference.
9. Where applicable, proposed jury instructions shall be exchanged and transmitted to chambers of the presiding judicial officer in Microsoft Word format on or before 15 days prior to the pretrial conference.
10. Where applicable, findings of fact and conclusions of law shall be exchanged and transmitted to chambers of the presiding judicial officer in Microsoft Word format on or before **N/A**.
11. A final settlement conference will take place 5 days before trial.
12. The case shall be ready for trial by 120 days following a ruling on all dispositive motions, and at this time is expected to take approximately 5 days.

The parties **DO NOT REQUEST** a conference with the court before the entry of the scheduling order.

Dated: July 28, 2021

Respectfully submitted,

/s/ Walt Auvil  
Walt Auvil, WVSB No. 190  
THE EMPLOYMENT LAW CENTER, PLLC  
1208 Market Street  
Parkersburg, WV 26101  
Phone: 304-485-3058  
Facsimile: 304-485-6344  
[auvil@theemploymentlawcenter.com](mailto:auvil@theemploymentlawcenter.com)

Avatara Smith-Carrington, Visiting Attorney

/s/ Lou Ann S. Cyrus  
Lou Ann S. Cyrus, Esquire (WVSB #6558)  
Roberta F. Green, Esquire (WVSB #6598)  
Caleb B. David, Esquire (WVSB #12732)  
Kimberly M. Bandy, Esquire (WVSB #10081)  
SHUMAN MCCUSKEY SLICER PLLC  
P.O. Box 3953  
Charleston, WV 25339  
(304) 345-1400; (304) 343-1826 (fax)  
[lcyrus@shumanlaw.com](mailto:lcyrus@shumanlaw.com)  
[rgreen@shumanlaw.com](mailto:rgreen@shumanlaw.com)

LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.  
3500 Oak Lawn Avenue, Suite 500  
Dallas, TX 75219  
Phone: 214-219-8585  
Facsimile: 214-219-4455  
[asmithcarrington@lambdalegal.org](mailto:asmithcarrington@lambdalegal.org)

Tara L. Borelli, Visiting Attorney  
Carl Charles, Visiting Attorney  
LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.  
158 West Ponce De Leon Ave., Ste. 105  
Decatur, GA 30030  
Phone: 470-225-5341  
Facsimile: 404-506-9320  
[tborelli@lambdalegal.org](mailto:tborelli@lambdalegal.org)  
[ccharles@lambdalegal.org](mailto:ccharles@lambdalegal.org)

Nora Huppert, Visiting Attorney  
LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.  
4221 Wilshire Boulevard, Suite 280  
Los Angeles, CA 90010  
Phone: 213-382-7600  
Facsimile: 213-351-6050  
[nhuppert@lambdalegal.org](mailto:nhuppert@lambdalegal.org)

Sasha Buchert, Visiting Attorney  
LAMBDA LEGAL DEFENSE AND EDUCATION  
FUND, INC.  
1776 K Street, N.W., 8th Floor  
Washington, DC 20006-2304  
Phone: 202-804-6245  
Facsimile: 202-429-9574  
[sbuchert@lambdalegal.org](mailto:sbuchert@lambdalegal.org)

Anna P. Prakash, Visiting Attorney  
Nicole J. Schladt, Visiting Attorney  
NICHOLS KASTER, PLLP  
IDS Center, 80 South 8th Street  
Suite 4700  
Minneapolis, MN 55402  
Phone: 612-256-3200  
Facsimile: 612-338-4878  
[aprakash@nka.com](mailto:aprakash@nka.com)

cdavid@shumanlaw.com  
kbandy@shumanlaw.com

***Counsel for Defendants William Crouch,  
Cynthia Beane, and West Virginia Department  
of Health and Human Resources, Bureau for  
Medical Services***

/s/ Eric D. Salyers  
Perry W. Oxley (WVSB#7211)  
David E. Rich (WVSB#9141)  
Eric D. Salyers (WVSB#13042)  
Christopher K. Weed (WVSB#13868)  
OXLEY RICH SAMMONS, PLLC  
517 9th Street, P.O. Box 1704  
Huntington, WV 25718-1704  
(304) 522-1138  
(304) 522-9528 (fax)  
poxley@oxleylawwv.com  
drich@oxleylawwv.com  
esalyers@oxleylawwv.com  
cweed@oxleylawwv.com

***Counsel for Defendant Ted Cheatham***

/s/ Aaron C. Boone  
Aaron C. Boone (WVSB #9479)  
BOWLES RICE LLP  
Fifth Floor, United Square  
501 Avery Street, Post Office Box 49  
Parkersburg, West Virginia 26102  
(304) 420-5501  
Fax: (304) 420-5587  
aboone@bowlesrice.com

Stuart A. McMillan (WVSB #6352)  
BOWLES RICE LLP  
600 Quarrier Street  
Charleston, West Virginia 25301  
(304) 347-1110  
Fax: (304) 347-1746  
smcmillan@bowlesrice.com

***Counsel for Defendant The Health Plan of  
West Virginia, Inc.***

[nschladt@nka.com](mailto:nschladt@nka.com)

*Attorneys for Plaintiffs*